LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 16 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 173

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
WILLIAM L. ROBINSON
LOWELL JOHNSTON
VILMA MARTINEZ SINGER
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

GEORGE COOPER
CHRISTOPHER CLANCY
401 West 117th Street
New York, New York 10026

Attorneys for Petitioner

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutory Provisions Involved	2
Statement	3
ARGUMENT—	
It Is a Violation of the Sex Discrimination Prohibition in Title VII, Civil Rights Act of 1964, to Refuse to Hire Women With Pre-School Children While Hiring Men of the Same Class	5
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969)	8
Cooper v. Delta Airlines, Inc., 274 F. Supp. 781 (E.D. La. 1967) *appeal dismissed*, No. 25,698 (5th Cir. 1968)	8
Cox v. U.S. Gypsum Co., 284 F. Supp. 74, 78 (N.D. Ind. 1968), *aff'd as modified*, 409 F.2d 289 (7th Cir. 1969)	14

PAGE

Fawcus Machine Co. v. United States, 282 U.S. 375, 378 (1931) 14
FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) 14, 15
FTC v. Mandel Bros., 359 U.S. 385, 391 (1959) 14

Int'l Chem. Workers v. Planters Mfg. Co., 259 F. Supp. 365, 366-67 (N.D. Miss. 1966) 14

Lansdale v. United Airlines, 62 Lab. Cas. ¶9417 (S.D. Fla. 1969) 11
Local 53, International Association of Heat & Frost Insulators and Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969) 7, 9
Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969) 7

Phillips v. Martin Marietta Corporation, 411 F.2d 1 (5th Cir. 1969) 1

Schultz v. First Victoria National Bank, 420 F.2d 648 (5th Cir. 1969) 8
Sprogis v. United Airlines, Inc., 62 Lab. Cas. ¶9399 (N.D. Ill. 1970) 8, 9

United States v. American Trucking Assn., 310 U.S. 534, 549 (1940) 14
United States v. Public Utilities Comm., 345 U.S. 295, 314-15 (1953) 14
United States v. Sheet Metal Workers, Local 36, 416 F.2d 135 (8th Cir. 1969) 7, 12
Udall v. Tallman, 380 U.S. 1, 16 (1965) 14

Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) 8, 10

PAGE

Statutes:

28 U.S.C. §1254(1) 1

42 U.S.C. §2000e-2(a)(§703(a)) 2, 3

42 U.S.C. §2000e-2(e)(§703(e)) 2

Miscellaneous:

Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969) 9

Equal Employment Opportunity Commission Sex Discrimination Guidelines, 29 C.F.R. §1604.1(a), §§1604.2, 1604.3 (1968) 10

EEOC Decision, Dodd v. American Airlines, Inc. Case No. 6-6-5762, reported in CCH Employment Practices Guide ¶1210.522 (June 20, 1968) 8

House Rep. No. 570, at H.R. 405, 88th Cong., 1st Sess. (1963) 16

Rosenfeld and Perrella, Why Women Start and Stop Working: A Study in Mobility, Monthly Labor Review (Sept., 1965) 12

Ross and Hill, eds. Employment, Race and Poverty (1967) 13

U.S. Dept. of Labor, Women's Bureau, Background Facts on Women Workers in the United States (Sept., 1968) 12, 13

U.S. Dept. of Labor, Women's Bureau, Working Mothers and the Need for Child Care Services (June 1968) 12

PAGE

U.S. Dept. of Labor, Women's Bureau, Who Are the Working Mothers? Leaflet 37 (1968) 13

U.S. Dept. of Labor, The Negro Family—The Case For National Action (March 1965) 13

U.S. Dept. of Labor, Bureau of Labor Statistics, Special Labor Forces Report (1964) 14

U.S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings (May, 1963) 14

110 Cong. Rec. 2566 (1964) 16

110 Cong. Rec. 7213 (1964) 10

IN THE

Supreme Court of the United States

October Term, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Citations to Opinions Below

The opinion of the District Court, not yet reported, is reprinted at pp. 22a-23a of the Appendix. The opinion of the U.S. Court of Appeals for the Fifth Circuit, reprinted in the Appendix at pp. 30a-38a, is reported at 411 F. 2d 1. The denial of rehearing and accompanying dissent of Chief Judge Brown and Judges Ainsworth and Simpson is reported at 416 F.2d 1257 (5th Cir. 1969), and is reprinted in the Appendix at pp. 42a-52a.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered May 26, 1969. A timely request for rehearing, initiated by a member of the Court, was denied October 13, 1969, and this petition for certiorari was filed January 10, 1970 and granted March 2, 1970 (A. 55a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the sex discrimination prohibition of §703, Civil Rights Act of 1964, is violated by refusal to hire any women with pre-school children while hiring men of the same class, where the distinction does not purport to be based on a bona fide occupational qualification.

Statutory Provisions Involved

United States Code, Title 42

§2000e-2(a) [§703(a) of Civil Rights Act of 1964]

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§2000e-2(e) [§703(e) of Civil Rights Act of 1964]

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Statement

On September 6, 1966 the petitioner, a woman with preschool age children, applied for a job as Assembly Trainee with the Martin Marietta Corporation, the respondent (hereinafter sometimes "the company") (A. 3a). Petitioner had a high school background, the only specified prerequisite for the job, but was told by respondent that applica-

tions from women with pre-school age children were not being considered (A. 4a, 16a, 17a).

On December 12, 1967, after properly proceeding through the EEOC, the petitioner filed suit claiming that respondent's actions constituted unlawful sex discrimination under the Civil Rights Act of 1964 (A. 6a). The Company's policy of refusing to consider applications from women with pre-school children is apparently not applied to men in the same category. Pursuant to petitioner's request for admission, the company admitted that it hires men with pre-school age children as Assembly Trainees (A. 21a-23a). The District Court struck the allegations in petitioner's complaint regarding the pre-school children rule, as "irrelevant and immaterial" and ruled for the company on summary judgment when she could introduce no other evidence of sex discrimination (A. 14a-15a, 22a-23a). The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on May 26, 1969, holding that this discrimination "based on a two-pronged qualification, i.e., a woman with pre-school age children" was not discrimination because of sex within the meaning of the Act (A. 30a-38a). A timely request for rehearing initiated by a member of the Court, was denied October 13, 1969, Chief Judge Brown and Judges Ainsworth and Simpson dissenting (A. 42a-52a).

ARGUMENT

It Is a Violation of the Sex Discrimination Prohibition in Title VII, Civil Rights Act of 1964, to Refuse to Hire Women with Pre-School Children While Hiring Men of the Same Class.

For reasons stated in greater detail below, the refusal of respondent to employ women with pre-school age children constitutes discrimination based on sex and is proscribed by Title VII of the Civil Rights Act of 1964.

1. The decision below is based upon an erroneous interpretation of Title VII.

Title VII prohibits discrimination in employment based on sex. This is such a case. Title VII declares:

> It shall be an unlawful practice for an employer—to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin.
> 42 U.S.C. §2000e-2(a) [§703(a)]. (Emphasis added.)

Title VII of the Civil Rights Act of 1964 prohibits not only flat refusals to employ women. Where, as here, the respondent hires men with pre-school children for one job and refuses to hire women with pre-school children for the same job, the respondent violates either that portion of Title VII which enjoins him from refusing to hire or that portion which bars him from "otherwise" discriminating because of such individual's sex. Insofar as the court below held that Title VII permitted such differentiation, it erred.

The District Court attempted to justify its decision by stating that:

> The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies (A. 23a).

While it may be argued that certain individual women (or, in equal measure, certain individual men) might have special responsibilities toward young children that are relevant to the satisfactory performance of a job (e.g., where the care of such children prevents a woman from remaining on the job from nine to five), respondent does not pretend to relate its employment specifications to such responsibilities. The company will not hire women with pre-school children if there is a grandmother or older sister at home to care for them, or if a day care center fulfills that purpose. Nor will it hire women with pre-school children even if their husbands are at home unemployed (as often occurs because of lay-off or disability).[1] Respondent will apparently hire widowers with pre-school children, but not widows. It will apparently hire men with pre-school children even if their wives are already employed elsewhere. Respondent's rule makes no attempt to assess the role of family responsibility and its relevancy to employment in any objective way.

The Fifth Circuit, in holding that the respondent did not violate Title VII, took a slightly different tack:

> The discrimination was based on a two-pronged qualification, i.e., a women with pre-school age children. . . . It is the coalescence of these two elements that denied her the position she desired (A. 36a).

However, as Chief Judge Brown points out in his dissent to the denial of the petition for rehearing:

---

[1] Studies show that 8% of working women have husbands who cannot work. Rosenfeld and Perrella, Why Women Start and Stop Working: A Study in Mobility, Monthly Labor Review, Sept. 1965, at 1077.

> The discrimination factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.
>
> *It is the fact of the person being a mother—i.e., a woman—not the age of the children, which denies employment to a woman which is open to a man* (A. 45a). (Emphasis added)

In short, the petitioner, because she is a mother—i.e., a woman—was denied employment. Title VII says this can no longer be done.[2]

Both courts adopted a discriminatory double standard rooted in traditional notions of the woman's usual place at

---

[2] The Court of Appeals also relied on data showing that respondent had hired a high percentage of female assembly trainees (75%-80%) as evidence of a lack of discrimination (A. 32a, 36a). This is beside the point, however. No particular percentage of female employees in itself shows a lack of discrimination. Such percentages are useful where a neutral practice (non-sex-related and non-race-related on its face) is being challenged because of its discriminatory impact. See *Local 53, Heat & Frost Insulators Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969) (nepotism rule); *Local 189, Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, —— U.S. —— (1970) (seniority rule); and *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969) (work referral rule). The Court of Appeals may have been misled by the approach taken in these neutral practice cases. Where, as here, however, the practice is not neutral, but is discriminatory on its face, statistics prove nothing. There are many reasons why there may be a high percentage of women in a job despite an employer's application of a double standard as to them. The only relevant point is that the percentage of women presumably would and should have been higher had the employer operated under neutral standards rather than under a double standard which screened out a large group of women from eligibility for the job.

home and the man's usual place at work. Respondent's rule is a pure example of the "subjective assumptions and traditional stereotyped misconceptions regarding the value of women's work" [3] and the "romantic paternalism" [4] which Title VII was designed to eliminate.

The unlawfulness of such double standards has been affirmed in numerous lower court decisions. In *Sprogis* v. *United Air Lines*, 62 Lab. Cas. ¶ 9399 (N.D. Ill., Jan. 21, 1970), the employer followed a policy of discharging female stewardesses who got married but not discharging male stewards under the same circumstances. The court held this double standard regarding marriage to violate Title VII.[5] In *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969), and *Weeks* v. *Southern Bell Tel. and Tel.*, 408 F.2d 228 (5th Cir. 1969), the employer refused to hire women for jobs requiring the lifting of moderate weights (35 pounds in *Bowe* and 30 pounds in *Weeks*) while not fixing a similar weight maximum for men. In both cases the courts held this double standard regarding weights to violate Title VII. Indeed, in the weight maximum cases it

---

[3] *Shultz* v. *First Victoria National Bank*, 420 F.2d 648 (5th Cir. 1969) (Equal Pay Act case).

[4] *Weeks* v. *Southern Bell Tel. and Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969).

[5] *Sprogis* v. *United Air Lines*, discussed in text is to be distinguished from *Cooper* v. *Delta Air Lines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967), *appeal dismissed*, No. 25,698 (5th Cir. 1968), which was referred to in the opinion below. *Cooper*, like *Sprogis*, was an attack on the widespread airline policy of discharging stewardesses who get married. But in *Cooper*, unlike *Sprogis*, the airline employed no men in the stewardess category and therefore the policy had no adverse effect on women vis a vis men. Subsequent to the *Cooper* decision, the refusal to hire male stewards was ruled unlawful, thus setting the stage for the successful challenge in *Sprogis*. See *Dodd* v. *American Airlines, Inc.* EEOC Decision, Case No. 6-6-5762, reported in CCH Employment Practices Guide ¶1210.522 (June 20, 1968).

was so clear that a double standard violates Title VII that the employer virtually conceded that the policy constituted sex discrimination, and attempted to justify it under a special exemption in the statute for bona fide occupational qualifications. This exemption, which Respondent has not claimed, is discussed at pp. 10-11, *infra*. The only lower court decision even suggesting that a sex-related double standard may be lawful is *Lansdale* v. *United Air Lines*, 62 Lab. Cas. ¶9417 (S.D. Fla. Dec. 2, 1969), where on the same facts as *Sprogis, supra*, the court held that the discharging of married stewardesses did not constitute sex discrimination. However, the District Court there relied upon and clearly felt controlled by the Court of Appeals decision in this case below. As such it offers no independent authority on this issue.

This does not mean that an employer must ignore family responsibilities of potential employees. To the extent such responsibilities may cause substantial problem in job performance an employer is free to set standards *to protect his bona fide business interests*. But such standards should be related to the problem at hand, not to the sex of the potential employee. Thus an employer may require that any parent with primary child care responsibilities make adequate day care arrangements. This rule would cover some men, e.g., widowers, and it would exempt some women, e.g., those whose husbands remain at home. Such neutral, non-sex-related standards are clearly permitted under Title VII whenever the needs of business require them.[6] Respon-

[6] Even a neutral rule should be supported by evidence of business need to prevent its use as a device to discriminate against women. See *Local 53, Heat & Frost Insulators and Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1600-1601 (1969).

dent, however, has made no attempt to use a neutral standard.

Moreover, Title VII even recognizes that in certain situations sex will be such a dominant factor in job performance that all women or some subgroup of women must per se be excluded. In such situations an employer may establish that sex is

> a bona fide occupational qualification [a BFOQ] reasonably necessary to the normal operation of [his] particular business or enterprise,

and thereby gain the right to impose a sex related hiring standard. However, use of this exemption is strictly limited to prevent it from vitiating the overall Act and it is unlikely that respondent could qualify under it.[7] See 110 Cong. Rec. 7213 (1964); *Weeks* v. *Southern Bell Tel. and Tel.*, 408 F.2d 228 (5th Cir. 1969); Equal Employment Opportunity Sex Discrimination Guidelines, 29 C.F.R. §1604.1(a) (1968).

The company has not even claimed that its policy rises to the level of a BFOQ. The company has not offered the slightest evidence of any sort that women with pre-school age children are any less capable, efficient, trustworthy, or otherwise less valuable employees than men with such children. Rather, respondent has attempted to gain the benefits which the law extends to a BFOQ without any evidence of such. Congress can hardly have intended to permit this. If employers were permitted to impose sex-related stan-

---

[7] Respondent apparently doubted that it could establish a BFOQ exemption and did not even bother to raise it as a possible defense below. However, in its Brief in Opposition to Petition for Certiorari, respondent indicates that it has second thoughts on the matter and will attempt to assert a BFOQ in the event it loses this appeal.

dards without establishing a BFOQ, the special statutory exemption with its strict limitations would become meaningless. Since respondent has neither used a neutral standard nor established a BFOQ, the company has not recognized the "different responsibilities" of men and women in a way permitted under Title VII. The District Court therefore erred in sustaining the company's practice on this ground.

2. The "sex-plus" principle established by the Court of Appeals decision threatens the effectiveness of the entire federal fair employment law generally and conflicts in principle with other Court of Appeals decisions.

In the words of Chief Judge Brown, dissenting below:

> If "sex-plus" stands, the Act is dead (A. 48a).

It is not difficult to see why this is not an exaggeration. We have already seen the first extension of the "sex-plus" rule—*Lansdale* v. *United Airlines*, 62 Lab. Cas. ¶9417. (S.D. Fla. Dec. 2, 1969), where the court upheld an employer policy of discharging married women, while retaining married men. Thus far, the rule has permitted the exclusion of women with pre-school age children and married women. What is next? Possibly young women—who may distract male workers. All of this could be justified on the ground that the discrimination was not against women as such, but rather only against those women who did not meet the special standard, and that this is "sex-plus".

If employers are thus free to exclude groups of women under the "sex-plus" rule, without having to meet the BFOQ test, the door is open to such vast erosion of female employment opportunity that Title VII will have no meaning. Moreover, if "sex-plus" is not sex discrimination, then it is

difficult to understand why "race-plus" is not exempted from the race discrimination prohibition in the Act.[8]

Even if the "sex-plus" rule is not greatly expanded, it will deal a serious blow to the objectives of Title VII when applied solely to exclude mothers of pre-school age children. If the law against sex discrimination means anything it should protect employment opportunities for those groups of women who most need jobs because of economic necessity. Working mothers of pre-schoolers are such a group. Almost twenty-nine percent of all mothers with pre-school age children (under 6 years old) work, a total of 4.1 million mothers as of 1967.[9] The number of working mothers with pre-school age children is continuing to rise.[10] Studies show that, as compared to women with older children or no children, these mothers of pre-school children were much more likely to have gone to work because of pressing need.[11] Forty-eight percent of mothers of pre-school children work because of financial necessity and 8 percent because their husbands are unable to work.[12] Frequently, these women are a key or only source of income for their families.

---

[8] While courts so far have not made this mistake in race cases, the decision below now opens that possibility. So far, a union rule requiring that applicants be recommended by present members in *Vogler, supra* and a union referral system which gave preference to men with previous referrals in *United States* v. *Sheet Metal Workers, Local 36, supra*, were both struck down.

[9] U. S. Dept. of Labor, Women's Bureau, Background Facts on Women Workers in the United States, 8 (Sept. 1968). This data includes only those classified as "ever married" by the Labor Department.

[10] U. S. Dept. of Labor, Women's Bureau, Working Mothers and the Need for Child Care Services, 7-8 (June 1968).

[11] Rosenfeld and Perrella, Why Women Start and Stop Working: A Study in Mobility, Monthly Labor Review, Sept. 1965, at 1077-79, Table I.

[12] *Ibid.*

The extent to which exclusion of mothers of pre-school children is contrary to Title VII becomes even more apparent upon examination of the racial impact of this exclusion. Its primary adverse impact is on blacks.

> [There is] no tendency for blacks in child bearing ages to retire even temporarily from the labor force. This situation is explained not only by the high incidence of poverty in the Negro community and the economic weakness of Negro males, but also by the large proportion of fatherless families.[13]

In 1967, nearly half of the non-white women in the working force had children under six years of age.[14] In contrast, only one-fourth of the white mothers had children under six.[15] These women tend to be family heads, responsible for the economic survival of their children. More than twice as many non-white mothers as white mothers are heads of families.[16]

Black women suffering under the double discrimination of race and sex are the most oppressed group of workers in the society. As women they earn much less than men. In 1966, the average yearly income of fully employed women was only 58% of the average yearly income of fully employed men.[17] And for black women the situation was even worse: for 1964 their average yearly income was only 70%

---

[13] Ross and Hill, eds., *Employment, Race and Poverty*, 23 (1967).

[14] U. S. Dept. of Labor, Women's Bureau, Who Are the Working Mothers? Leaflet 37 (1968).

[15] *Ibid.*

[16] U. S. Department of Labor, *The Negro Family—The Case for National Action* (March 1965).

[17] U. S. Dept. of Labor, Background Facts on Women Workers in the United States (September 1968).

of that of white women.[18] An important factor in this low income situation is the large number of black women working as domestics or in other service work outside the coverage of minimum wage laws.[19] Families dependent on such a breadwinner need every possible aid in breaking out of this bottom rung employment category and gaining decent factory and office work, such as that at the Martin Marietta Company. Title VII was designed to contribute to that effort and can do so significantly is "sex-plus" is firmly rejected.

3. The "sex-plus" principle has been rejected by the EEOC, whose rulings were improperly rejected by the Court of Appeals.

The importance of rulings and regulations of an administrative agency charged with enforcement of a statute has been established in a long line of cases. See *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931); *United States* v. *American Trucking Assn.*, 310 U.S. 534, 549 (1940); *United States* v. *Public Utilities Comm.*, 345 U.S. 295, 314-15 (1953); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 391 (1959). These cases emphasize judicial reliance on the special expertise of administrative agencies and their ability to apply relevant statutes to practical situations. In particular, several lower courts have relied upon the expertise of the Equal Employment Opportunity Commission. *Int'l Chem. Workers* v. *Planters Mfg. Co.*, 259 F. Supp. 365, 366-67 (N.D. Miss. 1966); *Cox* v. *U.S. Gypsum Co.*, 284 F. Supp. 74, 78 (N.D. Ind. 1968), *aff'd as modified*, 409 F. 2d 289 (7th Cir. 1969).

---

[18] U. S. Dept. of Labor, Bureau of Labor Statistics, Special Labor Forces Report (1964).

[19] U. S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, May 1963, Table A-21.

Due to the confidential nature of much of the work of the EEOC, only a small portion can be documented to this Court; yet it should be emphasized that any ruling or regulation promulgated by the EEOC derives from its broad experience in dealing with thousands of cases under the statute. More importantly, the EEOC is clearly in the best position to assess the long-run implications of "sex-plus" discrimination. The situation is thus very similar to that in *FTC* v. *Colgate-Palmolive Co., supra*, where the Court observed:

> as an administrative agency which deals continually with cases in the area, the Commission [FTC] is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act [FTC Act]. This Court has frequently stated that the Commission's judgments be given great weight by reviewing courts. 380 U.S. at 385.

The Court while noting that the courts have the final say, sustained the position of the FTC.

The EEOC has come out foursquare against the "sex-plus" theory of the court below. The Commission's Equal Employment Opportunity Sex Discrimination Guidelines deal specifically with this question in the context of married women:

> The Commission had determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex. 29 C.F.R. §1604.3 (1968)

The EEOC has backed up its views with amicus participation in this case in the Court of Appeals and a Petition for Certiorari before this court.

The importance of deferring to this regulation takes on particular meaning in light of the EEOC's role in Title VII enforcement. The EEOC, like other administrative agencies, promulgates rulings and regulations based on its expertise. Unlike most other agencies, however, the EEOC has no power to enforce its regulations and must rely on voluntary compliance by employers. This initial reliance on voluntary conciliation is a hallmark of Title VII. See 110 Cong. Rec. 2566 (1964) (discussion of amendment clarifying conciliation agreement); House Rep. No. 570 at H.R. 405, 88th Cong., 1st Sess. (1963) (report on earlier version of Title VII). Thus, critical to the efforts of the EEOC to perform this role delineated by Title VII is recognition of its expertise by the courts. Given such recognition, employers would not lightly disregard the EEOC and would be encouraged to settle through conciliation. On the other hand, should the EEOC regulations not be given substantial effect, the Commission itself would exert but little influence, and the full burden of Title VII enforcement would fall upon the courts. This is clearly not the pattern that Congress intended when it established a conciliation commission as the front line in Title VII enforcement.

We submit that the Court of Appeals gave insufficient weight to EEOC regulations. The decision below should be reversed for that reason as well as others advanced in this brief.

CONCLUSION

For the foregoing reasons the judgment below should be reversed and remanded.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
WILLIAM L. ROBINSON
LOWELL JOHNSTON
VILMA MARTINEZ SINGER
10 Columbus Circle
New York, New York 10019

EARL M. JOHNSON
625 West Union Street
Jacksonville, Florida 32202

GEORGE COOPER
CHRISTOPHER CLANCY
401 West 117th Street
New York, New York 10026

Attorneys for Petitioner